IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	Civil Action No. H-01-3624 (Consolidated)
This Document Relates To:	CLASS ACTION
MARK NEWBY, et al., Individually and ON Behalf of All Others Similarly Situated, Plaintiffs VS. ENRON CORP., et al., Defendants	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, t al., Individually and on Behalf of All Others Similarly Situated, Plaintiffs, VS. KENNETH L. LAY, ET AL., Defendants	

ORDER ON MOTIONS TO COMPEL THE BANKS TO PRODUCE THE SWORN STATEMENTS AND DEPOSITION TRANSCRIPTS OF THEIR EMPLOYEES

Pending before the Court is Lead Plaintiff's Motion to Compel the Banks to Produce the Sworn Statements and Deposition Transcripts of Their Employees (Instrument No. 1803), in

2021

support of which the "Outside Directors," [1] Kenneth L. Lay, and "Certain Private Action Plaintiffs"[2] have filed supportive memoranda. (Instruments Nos. 1972 and 1978, 1975, 1976, respectively). The *Newby* Lead Plaintiff seeks from Bank of America, Barclays, CIBC, Credit Suisse First Boston, Lehman Brothers, and Merrill Lynch and their subsidiaries (collectively the "Banks")[3] the sworn statements and deposition transcripts, in the Banks' possession, that were given by the Banks' employees and former employees to the Enron Bankruptcy Examiner. All of the Banks are defendants in the *Newby* case and in the cases with which it has been consolidated or coordinated. This Court has jurisdiction over the discovery in the *Newby* case.

On October 28, 2003 the Banks filed a motion for protective order in the bankruptcy court asking for an order barring the *Newby* plaintiffs from obtaining the transcripts of the sworn private statements provided to the Examiner by the current and former employees of the Banks. The Lead Plaintiff filed this motion on October 31, 2003. After a hearing on December 4, 2003, Judge Gonzalez granted the motion for protective order on December 8, 2003.

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[1]The "Outside Directors" are Robert A. Belfer, Norman P. Blake, Jr., Ronnie C. Chan, John H. Duncan, Joe H. Foy, Wendy L. Gramm, Robert Jaedicke, Charles A. LeMaistre, Jerome Meyer, Frank Savage, John Wakeham, Charles E. Walker, and Herbert S. Winokur, Jr.

[2]"Certain Private Action Plaintiffs" are plaintiffs in lawsuits that have been consolidated or coordinated with the *Newby* case, as reflected in the style of Instrument No. 1976.

[3]In the Opposition of Financial Institutions to Lead Plaintiff's Motion to Compel the Banks to Produce the Transcripts of the Sworn Statements of their Current and Former Employees (Instrument No. 1852) these defendants are referred to as "Financial Institutions," and are identified as Bank of America Corporation, Bank of America Securities L.L.C., Barclays PLC, Barclays Bank PLC, Barclays Capital Inc., Canadian Imperial Bank of Commerce, CIBC World Markets Corp., CIBC World Markets plc, Credit Suisse First Boston LLC, Credit Suisse First Boston (USA), Inc., Pershing LLC, Lehman Brothers Holdings Inc., Lehman Brothers Inc., Merrill Lynch & Co., Inc., and Merrill Lynch, Pierce, Fenner & Smith Incorporated. Throughout this Order these entities will be referred to collectively as "the Banks," although the Court recognizes that they are not all banks.

On December 11, 2003 this Court scheduled the pending motion to compel for a hearing. The hearing did not go forward as planned, however, because counsel for Lead Plaintiff asked for additional time in which to reach agreement with all parties on this and other discovery issues. The Court was informed on March 9, 2004 that a number of discovery issues had been resolved, but that the Lead Plaintiff's motion, Instrument No. 1803, had not been resolved.

The Banks rely upon the protective order of Judge Gonzalez, but Lead Plaintiff, Outside Directors, and Lay argue that Judge Gonzalez's ruling in the bankruptcy case should not be the final word in the matter. This Court agrees. This Court has the highest respect for Judge Gonzalez and the work he is doing on the bankruptcy case; the two courts have worked very well together over the entire time the respective cases have been pending. Ordinarily this Court would defer to his ruling. In this particular instance, however, his ruling affects the discovery in this civil litigation. It is very understandable that Judge Gonzalez in considering the motion pending before him was concerned that the witness statements taken by the Examiner be protected from discovery because they had been taken pursuant to stipulations of confidentiality upon which the witnesses could claim reliance. Judge Gonzalez wished to protect the bankruptcy process so that, in future, other bankruptcy examiners would not be hampered in their examinations. In the instant case, however, the witnesses knew that the statements would be provided to Enron, the debtor, and to the Creditors' Committee, each of which was expected to use the statements in preparing its own lawsuits. In fact, the Creditors' Committee had already filed its lawsuit in a Texas state court and participated in the taking of the Examiner's depositions and statements. Moreover, the Examiner's report, which is public record, references at length some of these witness depositions and

statements. Any reliance by the witnesses upon confidentiality, in the instant case, would have been misplaced.

The Lead Plaintiff does not seek the statements and deposition transcripts from the Examiner himself, but from the employers of the parties whose statements were taken. It was the Banks who obtained the confidentiality agreements from the Examiner for their protection. It is not the Examiner who wishes to keep them secret. The parties seeking the statements could, they acknowledge, retake depositions of the individuals whose statements and depositions were taken by the Examiner, but the costs would be enormous. Having the transcripts and statements themselves would allow the parties to streamline their determination of the depositions that need taking in the civil suit and would also serve as possible impeachment tools. This Court agrees with the Outside Directors that fairness dictates that all parties to the litigation should have access to the non-privileged information concerning the lawsuit, and Fed. R. Civ. Pr. 26(b)(1) contemplates access to such information in allowing discovery "regarding any matter, not privileged, that is relevant to the claim or defense of any party."

Just because Br. Rule 2004, which is described throughout the case law as allowing a "lawful fishing expedition," was employed by the Examiner to obtain these statements and deposition transcripts does not prohibit them from being discoverable in collateral matters. Fed. R. Civ. P. 26(b)(2) provides that in order to be discoverable, "relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The procedures of Rule 2004 are different from the discovery rules of the Federal Rules of Civil Procedure, but that fact alone does not make matters produced pursuant to Rule 2004 undiscoverable pursuant to the Federal Rules of Civil Procedure. A number of cases,

including *In re Buick*, 174 B.R. 299, 305 (Bankr. D. Colo. 1994); *In re Lufkin*, 255 B.R. 204, 208 (Bankr. E.D. Tenn. 2000); *In re Coffee Cupboard, Inc.* 128 B.R. 509, 516 (Bankr. E.D.N.Y 1991); *In re Table Talk, Inc.*, 51 B.R. 143, 145 (Bankr. D. Mass. 1985), are clear on the point that just because information gained via Rule 2004 may be used later in a collateral proceeding is no reason to forbid Rule 2004 discovery. These cases assume that the fruits of Rule 2004 discovery may be used in civil litigation in state or federal court, and it cannot be the case that these fruits are not discoverable merely because they were taken pursuant to Bankruptcy Rule 2004.

Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED, that the Bank Defendants, i.e. Bank of America Corporation, Bank of America Securities L.L.C., Barclays PLC, Barclays Bank PLC, Barclays Capital Inc., Canadian Imperial Bank of Commerce, CIBC World Markets Corp., CIBC World Markets plc, Credit Suisse First Boston LLC, Credit Suisse First Boston (USA), Inc., Pershing LLC, Lehman Brothers Holdings Inc., Lehman Brothers Inc., Merrill Lynch & Co., Inc., and Merrill Lynch, Pierce, Fenner & Smith Incorporated shall on or before close of business on March 29, 2004 produce to Lead Plaintiff copies of all deposition transcripts and/or sworn statements relating to the investigation by the Court Appointed Bankruptcy Examiner in the Enron Bankruptcy.

Signed at Houston, Texas, this 15th day of March, 2004.

Melinda Harmon

MELINDA HARMON
UNITED STATES DISTRICT JUDGE